IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 104 of 2000
with
Civil Application No.10313 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JETHALAL VELJIBHAI CHAUHAN

Versus

JADAVJI VELJIBHAI CHAUHAN

Appearance:
MS YAMINI J DESAI for Petitioner No. 1
MR RD DAVE for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 06/11/2001

C.A.V JUDGEMENT

1. The appellant, original defendant, by filing this appeal under Section 276 of the Indian Succession Act,

1925, has questioned the legality and validity of the judgment and order dated August 17, 2000 passed by the learned District Judge, Junagadh, in Civil Misc. Appeal No.48 of 1998. The learned District Judge, by the impugned judgment and order, issued 'probate' in favour of the respondent (original plaintiff) on the strength of the will dated July 10, 1975 executed by the deceased Velji Khima Chauhan in favour of the respondent Jadavji Veljibhai Chauhan.

2. The respondent, Jadavji Veljibhai Chauhan, had filed Civil Misc. Application No.159 of 1988, in the Court of the learned Civil Judge (S.D.), Junagadh, for obtaining probate on the basis of the will dated July 10, 1975 executed by his father, deceased Velji, who expired on December 21, 1978. By the said will, the deceased had bequeathed the tenancy rights of the suit shop in favour of the respondent. The said application for probate was opposed by the appellant by filing objection at Exh.14. It was contended that the tenancy right cannot be bequeathed by executing a will as it will be against the provisions of Section 5(11)(c) of the Bombay Rents, Hotel, and Lodging House Rates Control Act, 1947, (hereinafter referred to as 'Act'). It was also contended that the deceased Velji was not the tenant in the suit shop and the so-called will was got up and bogus and, therefore, the application for probate may be dismissed.

3. The learned Civil Judge (S.D.), Junagadh, held that the will Exh.83 dated July 10, 1975 was duly proved by the present respondent that it was executed by the deceased Veljibhai Chauhan in the sound and dispossing state of mind. However, the learned trial Judge upheld the contention of the appellant by holding that the tenancy rights cannot be bequeathed by the will as it would be against the provision of Section 5(11)(c) and Section 15(1) of the Act. The learned trial Judge, accordingly, by judgment and order dated August 5, 1996, dismissed the application filed by the present respondent for obtaining probate on the basis of the will of the deceased Veljibhai.

4. Against the said judgment and order, the present respondent filed Civil Misc. Appeal No.48 of 1998 in the District Court, at Junagadh. The learned District Judge, Junagadh, by the judgment and order dated August 17, 2000, allowed the appeal by issuing probate in favour of the respondent pursuant to the will executed by the deceased Veljibhai. The District Judge held that the Court while issuing probate on the basis of the will

cannot decide the question as to whether it was open for the deceased to bequeath tenancy right of the suit shop in favour of the present respondent. The learned District Judge observed that the question shall be decided by the competent Court under Section 5(11)(c) of the Act. The said judgment and order dated August 17, 2000 passed by the learned District Judge is challenged by the original defendant by filing this Second Appeal under Section 100 of the Code of Civil Procedure.

5. At the time of admission of the appeal, on February 7, 2001, the Court (Coram: H.R. Shelat, J. as he then was) framed the following substantial questions of law:

"(1) Whether the tenant can transfer or assign his tenancy right executing the Will ?
(2) Whether the lower Court was competent to grant probate on the basis of the Will ?

5. The learned advocate for the appellant. Ms. Yamini Desai, and the learned advocate Mr. Rajesh Dave have taken me to the entire record and proceedings of the case.

6. It is submitted by the learned advocate for the appellant that the tenancy right of the suit shop cannot be bequeathed in favour of the respondent by the deceased tenant Veljibhai in view of the prohibition contained in Section 5(11)(c) and Section 15 of the Act. It is contended by the learned advocate for the appellant that the deceased had no authority to transfer the tenancy right in favour of the respondent by creating a will and, therefore, this appeal be allowed and the judgment and order of the District Court granting probate in favour of the respondent be set aside. The learned advocate for the appellant, in support of the submission, has placed reliance on the decision of the Supreme Court in the case of Vasant Pratap Pandit vs.Dr. Anant Trimbak Sabnis, reported in 1995 (1) GLH p.737. The facts before the Supreme Court were that one Tara Bai, who was tenant of the disputed premises, was issueless. She left behind a will bequeathing her properties including tenancy right in the said premises to her sister's son, Gopal, and appointing the plaintiff-appellant, her brother's son, as executor thereof. The defendant-respondent, who happens to be the grand-son of a sister of the legatee, and his wife were staying with Tara Bai in the disputed premises. After her death, the appellant called upon the respondent to vacate the premises and on his refusal instituted a

suit for eviction in the City Civil Court, Bombay. The respondent resisted the suit principally on the ground that the bequest of the tenancy rights amounted to 'transfer' and it was impermissible under Section 15 of the Act. The trial Court had not accepted the contention of the respondent and decreed the suit whereby the respondent preferred an appeal before the High Court. The High Court, allowing the appeal and dismissing the suit, held that the word 'heir' appearing in Section 5(11)c) of the Act did not include 'legatee' and that the words 'assign' and 'transfer' appearing in S.15 of the Act were used in a generic sense to include bequest. The High Court further held that the appellant who was legatee had no right to file the suit. The Supreme Court, after taking into consideration various provisions of the Act, more particularly Section 5(11)(c) and Section 15 of the Act, held that:

"The legislative prescription is first to give protection to members of the family of the tenant residing with him at the time of the death. The basis for such prescription seems to be that when a tenant is in occupation of premises the tenancy is taken by him not only for his own benefit but also for the benefit of the members of the family residing with him. Therefore, when the tenant dies, protection should be extended to the members of the family who were participants in the benefit of the tenancy and for whose needs as well as the tenancy was originally taken by the tenant."

8. In the present case, the respondent is the son of the deceased who had by the will bequeathed the suit shop in favour of the respondent. The respondent was residing with the deceased during his life-time and was carrying on the business in the suit shop. Admittedly, the respondent is the son of the deceased who was not heir within the definition of 'heir' as per the provisions of Section 5(11) (c) of the Act. The facts before the Supreme Court were that the deceased Tara Bai had bequeathed the property to her sister's son, Gopal, ignoring the grand-son of a sister of the legatee and his wife who were staying with Tara Bai. In light of the above facts, the Supreme Court has held that tenancy right cannot be demised by a will. In my view, the facts of the present case are quite distinguishable and the ratio of the Supreme Court in the case of Vasant Pratap Pandit (supra) will not help the appellant.

9. The learned advocate for the appellant has also placed reliance on the decision of the Supreme Court in the case of Bhavarlal Labhchand Shah vs. Kanaiyalal Nathalal Intawala, reported in AIR 1986 Supreme Court 600

(=1986 GLH 331), wherein, it is ruled that a person occupying a non-residential premises as a tenant after the contractual period is over cannot bequeath his right to occupy the property as a tenant under a will in favour of a legatee who is not a member of his family carrying on business, trade or storage with him in the said premises at the time of his death under Section 5(11)(c) of the Rent Act. I am afraid, the decision in the case of Bhavarlal Labhchand Shah (supra) cannot come to the help of the appellant. In Bhavarlal's case, the deceased-tenant, after the termination of the contractual period was over, had bequeathed right to occupy the property by a will in favour of the person who was not a member of the family of the deceased-tenant. Here, in the present case, the facts are quite different. Admittedly, the appellant, Jethalal Veljibhai, was residing in Bombay. The respondent is the son of the deceased-tenant who was residing with him and carrying on the business in the suit shop which ultimately came to be bequeathed in his favour. Therefore, the reliance placed by the learned advocate for the appellant on the decision of the Bhavarlal's case (supra) also will not help the appellant.

10. On the other hand, the learned advocate for the respondent, Mr. R.D. Dave, has submitted that the probate Court cannot decide the question of title while granting the probate in favour of the legatee. In support of his submission, the learned advocate for the respondent has placed reliance on the decision in the case of Bapubhai Somabhai Patel (deceased through heirs vs. Vithalbhai Somabhai Patel, reported in 2000(2) GLR p.1056, wherein, it is ruled that the probate Court is only concerned with the question as to whether the will on which the probate is sought for is duly executed and attested in accordance with law and the Court cannot enquire into the title of the property bequeathed. In my view, the appellate Court was justified in granting the probate in favour of the respondent, because it had come to the conclusion that the will was genuine and the deceased was the tenant of the suit shop. The appellate Court has granted the probate of the will Exh.83 in favour of the respondent subject to the decision of the competent Court under the Rent Act to determine transmission of the tenancy in favour of the respondent and other heirs of the deceased. The appellate Court had rightly exercised its jurisdiction as probate Court while issuing probate in favour of the respondent. If the rights of the appellant are affected with respect to the tenancy rights of the suit shop which is bequeathed by the deceased by the will, then the appellant can always

move any legal proceeding available to him to claim and establish his right to the suit shop as a heir of the deceased tenant. At the stage of deciding the question whether the respondent was entitled to grant of probate in his favour pursuant to the will of the deceased, the probate Court was not required to go into the question of deciding transmission of the tenancy in view of Section 5(11)(c) of the Act.

11. As a result of foregoing discussion, the first substantial question of law framed by the Court at the time of admission of the appeal is answered in the affirmative by holding that the tenant can transfer his tenancy right by executing the will subject to determination of transmission of tenancy right under the provisions of Section 5(11)(c)(i) of the Bombay Rent Act. The second substantial question of law, whether the lower Court was competent to grant probate on the basis of the will, is also answered in the affirmative by holding that the Court below was competent to grant probate on the basis of the will which was proved to be genuine will of the deceased Veljibhai Chauhan and it was not required to see the title and the transmission of the tenancy right at the time of issuing probate in favour of the respondent. Once the probate Court was satisfied about the genuineness of the will, it was competent enough to grant probate on the basis of the will in favour of the respondent.

12. In the result, the appeal filed by the appellant is dismissed. Civil Application No.10313 of 2000 is also dismissed. Rule issued in Civil Application No.10313 of 2000 is discharged. The interim relief is vacated. There shall be no order as to costs.

November 06, 2001 (M.H. Kadri, J.)

(swamy)